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No. 93-667

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

NELL D. AUTERY, ADMINISTRATRIX OF THE ESTATE OF ROY FRANKLIN AUTERY, DECEASED, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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17 pp

QUESTION PRESENTED

Whether petitioners' tort claims against the government, which are based on the allegedly negligent implementation of a tree inspection policy for the Great Smoky Mountains National Park, are barred by the discretionary function exception in the Federal Tort Claims Act, 28 U.S.C. 2680(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-21a) is reported at 992 F.2d 1523. The opinion of the district court (Pet. App. 22a-58a) is reported at 786 F. Supp. 944.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1993. A petition for rehearing was denied on July 28, 1993. Pet. App. 1a. The petition for a writ of certiorari was filed on October 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On July 5, 1989, Roy Autery and petitioner Charlotte Schreiner were driving on U.S. Highway 441 in the Great Smoky Mountains National Park when a black locust tree fell onto the road and struck their car. Autery, the driver, was killed; Schreiner, the passenger, was injured. The accident occurred in the North Carolina part of the Park, about two hundred yards from the Oconaluftee Visitors' Center. The tree fell because of root rot. Pet. App. 3a-4a, 27a-28a, 31a.

At the time of the accident, the Park had an unwritten policy for inspecting and removing potentially dangerous trees. The policy, as later embodied in writing, provided that the Park would "make every reasonable effort within the constraints of budget, manpower, and equipment available to detect, document, remove, and prevent tree hazards." Pet. App. 33a; see also *id.* at 31a-33a. Pursuant to the policy, park personnel initially inspected for tree hazards from the road, particularly in heavily trafficked areas of the Park. Trees that appeared potentially dangerous on initial inspection were more closely inspected for possible removal. *Id.* at 5a, 39a. Before the accident, park personnel had been told by a plant pathologist that certain types of trees, including black locusts, were subject to diseases that could cause their branches or tops to break off. *Id.* at 5a, 33a. The Park's policy did not, however, require the inspection or removal of any particular types or numbers of trees. *Id.* at 14a, 17a.

2. The administratrix of Roy Autery's estate, petitioner Nell Autery, and petitioner Schreiner filed separate suits against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674 *et seq.*, in the United States District Court for the Southern

District of Alabama. Pet. App. 2a. The cases were consolidated and referred to a Magistrate Judge. *Id.* at 23a.

The government moved for summary judgment, arguing, among other things, that petitioners' claims are barred by the discretionary function exception of the FTCA, 28 U.S.C. 2680(a).[1] The Magistrate Judge recommended that summary judgment be denied. See Pet. App. 26a. In the Magistrate Judge's view, the discretionary function exception did not apply because "no element of choice was presented when the Defendant failed to remove black locust trees which were located within 'striking' distance of the roadway." *Id.* at 48a. In the alternative, the Magistrate Judge concluded that, even if

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[1] The FTCA generally waives the sovereign immunity of the United States from claims

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b). That waiver is subject to certain exceptions. The exception relevant here, the discretionary function exception, provides (28 U.S.C. 2680(a)):

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

park personnel did have discretion as to the removal of the tree that struck Roy Autery's car, decisions regarding the removal of trees are not the type of discretionary decision that Congress intended to protect in enacting the discretionary function exception. *Id.* at 49a-50a. The district court adopted the Magistrate Judge's recommendation and reasoning. *Id.* at 27a.

After a bench trial, the court entered judgment in favor of petitioners. It held that park personnel "were negligent in not taking more positive, aggressive action to eliminate the [tree] hazard in areas such as the place where the accident occurred." Pet. App. 34a-35a. It awarded petitioner Autery $500,000 in compensatory damages; it awarded petitioner Schreiner $477.30 in actual expenses and $20,000 for emotional distress. *Id.* at 55a-58a.[2]

3. The court of appeals reversed and remanded with instructions to the district court to dismiss the action. Pet. App. 1a-21a. The court held that petitioners' claims are barred by the discretionary function exception of the FTCA.

The court applied "the two-part test for determining whether the government's conduct falls within the scope of the discretionary function exception" (Pet. App. 8a) articulated in *United States* v. *Gaubert*, 499 U.S. 315 (1991). Under that test, the court of appeals observed, it was required "first [to] determine whether the chal-

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[2] The court limited petitioner Autery's award to $500,000, even though at trial she claimed damages in a greater amount, because she had sought only $500,000 in her administrative claim. Pet. App. 56a; see also 28 U.S.C. 2675(b) (limiting recovery to amount sought in administrative claim, in the absence of newly discovered evidence of additional damages not reasonably discoverable at time administrative claim is made).

lenged act or omission violated a mandatory regulation or policy that allowed no judgment or choice." Pet. App. 8a-9a. The court explained that the discretionary function exception would not bar a claim "if a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow, because the employee had no rightful option but to adhere to the directive." *Id.* at 9a, quoting *Gaubert*, 499 U.S. at 322 (internal quotation marks omitted). The court of appeals further observed that, even if the challenged conduct "involve[d] an element of judgment," the conduct was not protected by the discretionary function exception unless it was "grounded in the policy of the regulatory regime." Pet. App. 9a, quoting *Gaubert*, 499 U.S. at 322, 325.

The court then turned to the questions of whether the implementation of the Park's tree inspection policy was discretionary and, if so, whether it involved the type of discretion that the discretionary function exception was meant to protect. The court of appeals framed "the relevant inquiry" under the first part of this test as "whether controlling statutes, regulations and administrative policies mandated that the Park Service inspect for hazardous trees in a specific manner." Pet. App. 13a. The court answered that question in the negative, determining that "no mandatory statute, regulation or policy controlled the development and implementation of [the Park's] unwritten tree inspection plan." *Id.* at 18a. The court observed that the pertinent statute authorizes the Park Service, under authority of the Secretary of the Interior, to provide "in [its] discretion for the destruction . . . of . . . plant life as may be detrimental to the use of [the national] parks." *Id.* at 14a, quoting 16 U.S.C. 3. The court further observed that the pertinent agency directive was similarly "written in broad language"; although the directive "provided that the saving and safe-

guarding of human life takes precedence over all other park management activities" (Pet. App. 14a) (internal quotation marks omitted), it "d[id] not mention tree inspections, nor how the agency should implement the goal of safety or balance it against other considerations." *Ibid.* Finally, the court observed that the tree inspection policy for the Park "required only that employees 'make every effort within the constraints of budget, manpower, and equipment available to recognize and report' hazardous trees." *Ibid.* Thus, the policy "prescribed neither a particular method of inspection nor special rules for inspecting black locust trees." *Ibid.* Accordingly, the court held that the Park's failure to inspect and remove the tree that struck Roy Autery's car was a discretionary decision. See *id.* at 15a-16a.

The court of appeals next held that the decision whether to inspect and remove the tree involved the type of discretion that the discretionary function exception was intended to protect. Pet. App. 18a-21a. The court observed that in determining whether the challenged governmental conduct was grounded in policy considerations—and thus within the intended scope of the exception—courts are required under *Gaubert* to focus "not on the [government] agent's subjective intent * * * but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 20a, quoting *Gaubert*, 499 U.S. at 325. The court further noted that in other cases involving accidents in national parks, "courts have held that decisions about what safety measures to employ in national parks and how to execute them involve balancing the same considerations that inform all policy decisions regarding the management of national parks: safety, aesthetics, environmental impact, and available financial resources." *Id.* at 18a. The same was true here:

> To decide on a method of inspecting potentially hazardous trees, and in carrying out the plan, the Park Service likely had to determine and weigh the risk of harm from trees in various locations, the need for other safety programs, the extent to which the natural state of the forest should be preserved, and the limited financial and human resources available.

Id. at 21a.

ARGUMENT

Petitioners contend that the court of appeals erred in holding that their claims are barred by the discretionary function exception of the FTCA. The court of appeals correctly determined, however, that the question of whether petitioners' claims are barred by the discretionary function exception is governed by the two-part test this Court most recently enunciated in *Gaubert*. The court of appeals' application of the *Gaubert* test to the facts of this case is consistent with decisions of other courts of appeals on similar facts. Nor do petitioners identify any question of broad legal importance warranting this Court's attention.

1. "The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). As this Court most recently explained in *Gaubert*, "[t]he exception covers only acts that are discretionary in nature, acts that 'involv[e] an element of judgment or choice.'" 499 U.S. at 322, quoting *Berkovitz*, 486 U.S. at 536. "Furthermore, even 'assuming the challenged conduct involves an element of judgment,' it remains to be decided 'whether that judgment is of the kind that the discretionary function exception was designed to shield.'" *Gaubert*, 499 U.S. at 322-323, quoting *Berkovitz*, 486

U.S. at 536. The court of appeals correctly determined that these well-settled principles govern the question of whether petitioners' claims are barred by the discretionary function exception. Pet. App. 10a-21a.

a. The court of appeals followed the proper course by considering, first, whether the government conduct on which petitioners' claims are based was discretionary. Pet. App. 10a-18a. The court correctly answered that question in the affirmative. *Id.* at 15a. As the court held, this is not a case in which "a 'federal statute, regulation, or policy specifically prescribe[d] a course of action for an employee to follow.'" *Gaubert*, 499 U.S. at 322, quoting *Berkovitz*, 486 U.S. at 536. The tree inspection policy for the Great Smoky Mountains National Park did not require the inspection or removal of any particular types or numbers of trees. Rather than prescribing specific and mandatory procedures, the policy broadly required park personnel to "make every effort within the constraints of budget, manpower, and equipment available to recognize and report" hazardous trees, focusing on those in the most-travelled parts of the Park. Pet. App. 14a. The policy thus gave park personnel considerable discretion in identifying and dealing with potentially hazardous trees.

Petitioners contend (Pet. 12), however, that park personnel had no choice but to inspect and remove the tree that struck Roy Autery's car. They assert that "[t]he sight of a black locust tree within striking distance of a heavily used roadway *required* a walk-around inspection." Pet. 12. If petitioners mean that a close-up inspection of every black locust tree close to the road was required under the terms of the tree inspection policy, they are wrong on the facts. As both lower courts found, the policy did not expressly impose such a requirement. Pet. App. 5a, 39a. If, on the other hand, petitioners mean

that the policy *should* have required park personnel to inspect at close proximity all black locust trees near the road, they are wrong on the law; their challenge to the substance of the policy invites "precisely th[e] sort of judicial intervention in policy-making that the discretionary function exception was designed to prevent." *United States* v. *Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 820 (1984). Thus, however it is interpreted, petitioners' assertion does not establish that "a federal statute, regulation, or policy specifically prescribe[d] a course of action for an employee to follow" with respect to the conduct on which petitioners' claims are based. *Gaubert*, 499 U.S. at 322 (internal quotation marks omitted).

Petitioners rely on a supposed admission by park personnel that "if [a walk-around] inspection had been done in this case, the subject tree would have been removed." Pet. 12. Any such admission, however, does not help them; it suggests only that the discretion of park personnel would be limited *after* they had determined that a tree was hazardous and needed to be removed. Thus, if park personnel had determined that the tree that struck Roy Autery's car was hazardous and needed to be removed, they would have had a non-discretionary duty to exercise due care in removing it. Cf. *Berkovitz*, 486 U.S. at 538 n.3 (discussing *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955)). That situation would be comparable to a surgeon's duty to amputate a human limb after learning that it was hopelessly gangrenous. If that duty were breached, a malpractice claim would not be barred by the discretionary function exception.

This case involved decisionmaking at a different stage, namely, decisionmaking concerning whether to inspect a tree for possible hazards. The discretionary nature of such decisionmaking is clear from *Varig Airlines*.

There the Court held that the discretionary function exception barred claims based on the Federal Aviation Administration's allegedly negligent implementation of a "spot-check" system of inspecting aircraft. 467 U.S. at 814-820. The FAA's spot-check system, like the Park's tree inspection policy, gave federal officials broad discretion in selecting what to inspect. See *id.* at 817-820. The Court in *Varig Airlines* accordingly concluded that the selection of airplanes for safety inspections was discretionary. *Id.* at 801-803, 820-821. The court of appeals here therefore correctly concluded that the selection of trees for safety inspections was likewise discretionary.[3]

Finally, petitioners challenge (Pet. 12) the court of appeals' determination (Pet. App. 17a) that "there was no evidence presented" that park personnel violated the Park's tree inspection policy. That fact-bound challenge is without merit. Petitioners assert that "the evidence established that park employees had been in the immediate vicinity of the subject tree and still failed to detect it even though it had visible external signs of decay." Pet. 13. The portion of the record that petitioners cite for that assertion, however, does not support it.[4] In any event, even if there were evidence

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[3] Here, as in *Varig Airlines*, the function was discretionary even if the federal officials abused their discretion when they failed to discover the danger that led to the injuries complained of. As the court of appeals observed, "[t]he FTCA expressly provides that the exception 'applies to policy judgments, even to those constituting abuse of discretion.'" Pet. App. 13a, quoting *Dickerson, Inc.* v. *United States*, 875 F.2d 1577, 1581 (11th Cir. 1989).

[4] In the portion of the record on which petitioners rely, petitioners' counsel asked a witness whether "there were other stumps of trees where somebody had already been up in this area cutting down trees." The witness's answer was equivocal: "Yes, probably. I don't know." 3 R. 205. Moreover, there was no evidence con-

that park personnel had recently removed trees in the vicinity of the tree that struck Roy Autery's car, that evidence would not establish a violation of the tree inspection policy, since the policy did not require park personnel to inspect all trees in the vicinity of trees that were being removed.

b. With regard to the second part of the *Gaubert* test, the court of appeals held that the Park's implementation of its tree inspection policy involved the type of discretion that the discretionary function was meant to protect. Pet. App. 18a-21a. The Park's policy was based on an agency directive that stressed the "saving and safeguarding of human life * * * over all other park management activities." *Id.* at 14a. The court of appeals determined that the concern for safety expressed in the policy was explicitly qualified by "the constraints of budget, manpower, and equipment available." *Ibid.* The court of appeals also determined that it was likely that, in developing the tree inspection policy, the Park considered factors other than safety from tree hazards, such as "the need for other safety programs [and] the extent to which the natural state of the forest should be preserved." *Id.* at 21a. Based on those determinations, the court of appeals concluded that the implementation of the Park's policy was "based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (internal quotation marks omitted).

Petitioners contend that an agency's "failure to act" can never involve a decision based on policy. Pet. 15. That broad contention is plainly wrong. Petitioners'

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cerning when or why the other trees had been removed. No violation of park policy is established by the bare fact that at some time in the past and for some reason, park personnel had removed trees in the vicinity of the tree that later struck Roy Autery's car.

contention cannot be reconciled with the text of the discretionary function exception, which expressly applies, not only to the "exercise or performance" of a discretionary function, but also to "the failure to exercise or perform" such a function. 28 U.S.C. 2680(a). Nor can petitioners' contention be reconciled with decisions in which this Court has applied the exception to bar claims based on an agency's failure to act. See *Varig Airlines*, 467 U.S. at 814-816; see also *Dalehite* v. *United States*, 346 U.S. 15, 23-24, 37-38, 42-44 (1953) (discretionary function exception barred claims based on government's allegedly negligent failure to determine explosive qualities of fertilizer and failure adequately to supervise loading of fertilizer).

Petitioners next argue that the government was required to prove that "while the park personnel were driving along the park's roadways * * * they were balancing economic, social, or political concerns." Pet. 17 (internal quotation marks omitted). In *Gaubert*, however, this Court stated that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325. Petitioners do not explain how their argument can be squared with *Gaubert*.

2. There is no conflict among the circuits on the question presented here. As the court of appeals observed, other courts of appeals have held that the discretionary function exception bars claims based on alleged negligence in the implementation of safety measures in national parks. Pet. App. 18a; see also, *e.g.*, *Kiehn* v. *United States*, 984 F.2d 1100, 1103-1108 (10th Cir. 1993) (discretionary function exception barred claims based on allegedly negligent failure to warn hikers of unstable

rock formation and allegedly negligent rescue); *Johnson* v. *United States Dep't of Interior*, 949 F.2d 332, 336-340 (10th Cir. 1991) (same); *Zumwalt* v. *United States*, 928 F.2d 951 (10th Cir. 1991) (failure to warn). The decisions cited by petitioners in which the exception has been found inapplicable all involved violations of non-discretionary duties specifically mandated by regulation or agency guidelines. Pet. App. 13 n.6 (citing cases). Those decisions are inapposite in this case, which involved a policy that did not specifically prescribe the course of action park personnel were required to take with respect to the tree that struck Roy Autery's car.

For the same reason, the Eleventh Circuit decision on which petitioner relies, *Phillips* v. *United States*, 956 F.2d 1071 (1992), is inapposite. In *Phillips*, the Eleventh Circuit held that the discretionary function exception did not bar claims based on violations of an accident prevention plan and safety manual by employees of the Army Corps of Engineers. *Id.* at 1076-1077. As the Eleventh Circuit explained in the present case, its decision in *Phillips* rested on a determination that the particular policy at issue established mandatory duties that government employees breached. Pet. App. 16a-17a. Thus, *Phillips* reflects the principle that "[i]f the employee violates the mandatory [agency regulation or guideline], there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *Gaubert*, 499 U.S. at 324. That principle is not implicated here, because, as the Eleventh Circuit correctly held, park personnel did not violate any duties specifically prescribed by statute, regulation or agency guideline. In any event, any conflict between *Phillips* and the decision below is for the Eleventh Circuit to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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